IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.86 OF 2002

Sou.Jayashree Ananda Salave **... Appellant**

(Orig.Respdt-wife)

V/s

Shri Ananda Lahanu Salave **...Respondent**

(Orig.Petr.Husband)

Shri P.J.Shinde for Appellant

Shri Amit D. Sale for Respondent

CORAM:S.B.MHASE AND

S.R.SATHE,JJ.

DATED: 10th July 2006

JUDGMENT:- (**Per S.R.Sathe,J**)

1. The Appellant, original Respondent-wife in M.J.Petition NO.855 of 1997 has preferred this appeal against the judgment and order passed by the Court of Judge, Family Court NO.3, Pune whereby the petition filed by the husband (present Respondent) for divorce was decreed in his favour on the ground of Section 13(1A)(ii) of Hindu Marriage Act, 1955 i.e. non resumption of co-habitation between the parties for more

than one year after the date of passing of the decree for restitution of conjugal rights. For the sake of convenience hereafter the parties shall be referred to as the Petitioner-husband and Respondent-wife.

2. Brief facts giving rise to this appeal are as under:-

. The marriage of Petitioner and Respondent took place as per Boudha Religion on 10-12-1978. After marriage Respondent-wife started residing with the Petitioner. For few days she lived happily. It is Petitioner-husband's case that the Respondent wife was not behaving properly. She was not doing the household work neatly. She was not taking care of her daughter and used to neglect the Petitioner-husband. She often used to speak arrogantly with elderly persons in the family and used to leave the matrimonial home without informing the petitioner-husband. According to him, one day the parents of his wife asked him to perform marriage with younger sister of Respondent-wife. When such proposal came from the parents of Petitioner's wife he was greatly surprised as he was not agreeable to that he also refused the said proposal. According to the Petitioner-husband on that count the Respondent- wife and her parents started harassing him. They started making allegations against him and lodging complaint with Police and even with the Senior officers of the department where petitioner was working. Ultimately,

the Respondent-wife left the matrimonial home on 4-9-1993. Thereafter, she filed petition for restitution of conjugal rights as per Section 9 of Hindu Marriage Act. The Petitioner-husband also filed petition bearing No.71 of 1993 for custody of minor daughter. However, the petition filed by the Respondent-wife for restitution of conjugal rights was decreed in her favour and the application filed by the Petitioner for the custody of the minor daughter was rejected and only access was given. Thus, according to the Petitioner-husband the Respondent had in fact deserted him and treated him with cruelty.

3. It is the case of the Petitioner-husband that after decree for restitution of conjugal rights was passed against him he made efforts to bring his wife to his house. However, she did not come. On the contrary, she took the daughter and went to her parent’s home. Even thereafter Petitioner-husband issued notice through Advocate to his wife on 22-6-1994 and called upon her to come and cohabit with him. In spite of the same the Respondent-wife did not cohabit for a period of more than one year after passing of the decree for restitution of conjugal rights. Therefore, he also filed petition for divorce on the ground mentioned in Section 3(1)(ia)(ib) and 13(1A)(ii) of Hindu Marriage Act 1955.

4. The Respondent filed her written statement at Exh.7

and opposed the application. She admitted that her marriage with Petitioner took place on 10-2-1978 and thereafter she had 2 children from the Petitioner. However, the first child expired immediately and second daughter viz. Rani is now of 7 years age. Respondent-wife denied all allegations made by the husband and contended that the Petitioner-husband was in fact ill-treating her on the ground that she had not male child. The Petitioner-husband often used to say that in order to have male child he would perform second marriage and for that Respondent should give permission. She also contended that as she refused to give consent to the proposal of the Petitioner-husband, he started behaving rudely. He used to return home late at night and when she asked him about the same, he assaulted her and drove out of the house. She therefore lodged complaint with Vishrantwadi Police Station. However, the police did not take any action due to influence of the Petitioner-husband.

5. The Respondent-wife has also contended that when she was residing with Petitioner, one day on 10-2-1993 he had taken her to Shivaji Nagar and obtained her signature on one stamp paper. She also contended as her parents used to residing near to her matrimonial house whenever petitioner-husband drove her out she used to go to her parent’s home. But thereafter returned on the next day. With a view to avoid her Petitioner-husband started going out of his own house by locking the same.

She also contended that Petitioner-husband used to tell her that she should bring amount of Rs.10,000/- from her parents so that he would be in a position to clear the loan. According to her Petitioner also performed second marriage on 2-9-1993 with Surekha Raghunath Rajguru, resident of Ambernath.

6. It is her case that on 9-10-1993 she filed M.J.Petition No.730 of 1993 for restitution of conjugal rights wherein she alleged that her husband has withdrawn herself without sufficient cause. The Petitioner-husband opposed the said application. However, after considering the evidence of both the parties decree for restitution of conjugal rights was passed against the husband. It is her case that in spite of said decree the Petitioner did not take her to the matrimonial home as the Petitioner performed second marriage. She even filed criminal case bearing No.222 of 1993 under Section 494 of IPC against the Petitioner. Respondent-wife therefore contended that petition for divorce filed by her husband is false and prayed for dismissal of the same.

7. On these pleadings, the learned Judge, Family Court, Pune framed issues at Exh.9. In order to prove his case the Petitioner examined himself. As against this the Respondent wife examined herself at Exh.62 and her father Arjun Shinde at Exh.66. After considering the evidence of both the parties the learned Judge, Family

Court, Pune came to the conclusion that the Petitioner-husband has failed to prove that the Respondent wife has deserted him or that she has ill-treated him. He however held that after decree for restitution of conjugal rights was passed there was no cohabitation between Petitioner-husband and Respondent-wife during the period of one year and as such the Petitioner is entitled for divorce on the ground of Section 13(1A)(ii) of Hindu Marriage Act, 1955 and accordingly decreed the petition for divorce. The above mentioned order is challenged by the Respondent-wife in this appeal.

8. Shri Shinde, learned Advocate for the Respondent-wife has urged only one point. He submitted that though decree for restitution of conjugal rights was passed against the Petitioner-husband he did not take the Respondent-wife to matrimonial home. On the contrary whenever she made efforts to go and reside with the Petitioner and cohabit with him he refused. The learned Advocate for the Respondent submitted that in the instant case the Petitioner-husband is trying to take advantage of his own wrong and as such having regard to provisions of Section 23(1)(a) of Hindu Marriage Act the decree for divorce should not have been granted in favour of the Petitioner-husband. He therefore submitted that appeal be allowed and decree for divorce be set aside.

9. As against this the learned Advocate for the

Petitioner-husband supported the judgment and order passed by the trial Court.

10. It is not in dispute that the marriage between the Petitioner and Respondent took place on 10-12-1978 and out of the said wedlock Respondent-wife had 2 children. Unfortunately, the first female child expired. The second female child Rani is residing with Respondent-wife. It is also an admitted fact that the Respondent-wife had filed M.J.Petition No.730 of 1993 for restitution of conjugal, rights against the present Petitioner-husband and in that application it was held that the Petitioner-husband has withdrawn himself from the society of Respondent- wife without any reasonable excuse. Hence on that ground decree for restitution of conjugal rights was passed against the present Petitioner-husband on 29-3-1994. It is also an admitted fact that even after the said decree there was no cohabitation between husband and wife till the time the Petitioner-husband filed the present petition for divorce or even thereafter.

11. Though the Petitioner-husband had claimed divorce on the ground of desertion and cruelty he utterly failed to adduce any cogent evidence in that behalf and as such the learned trial Judge rightly refused to pass decree on this ground. The finding of the learned trial Judge in that behalf is not at all challenged before us.

12. The learned trial Judge has passed the decree for divorce in favour of the Petitioner-husband on the ground mentioned in Section 13(1A)(ii) of Hindu Marriage Act, 955. It would be worthwhile to see what the said Section says. It runs as follows :-

> 13(1A) Either party to a marriage, whenever solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground:
>
> (i) x
>
> (ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

. Shri Shinde, learned Advocate for the Respondent-wife strenuously argued before us that in the instant case the wife had in fact filed petition for restitution of conjugal rights. It was decreed against the Petitioner-husband, so, it was necessary for him to take his wife for cohabitation. However, he has failed to do so. According to him even at the time when Respondent-wife made efforts to go and reside with the Petitioner-husband he refused. So, under such

circumstances according to him when husband had not obeyed the decree for restitution of conjugal rights he is not entitled to take advantage of his own wrong. For this proposition he has placed reliance on Section 23(1)(a) of Hindu Marriage Act. It would be worthwhile to see what the said Section says. It runs as follows:-

> 23(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that-
>
> (a) any of the grounds for granting relief exists and the petitioner except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub clause (b) or sub-clause (c) of clause (ii) of Section 5 is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief.

13. In the instant case there is no doubt that after passing of the order of restitution of conjugal rights cohabitation has not taken place between the parties till today. The question arises who is at fault. Whether it can be said that the Petitioner-husband is at fault and he is now trying to take advantage of his own wrong. While considering this aspect, it must be noted that the Petitioner-husband after passing of the decree for restitution of conjugal rights had in fact issued notice to the Respondent-wife and called upon her to come and cohabit with him. Admittedly, such notice was

received by the Respondent. It is her case that she even made efforts to go and cohabit with her husband but he did not allow her . At the same time an attempt has been made on her part to say that the Petitioner-husband has in fact performed second marriage and for that purpose she has even filed a criminal case under Section 494 of IPC against him and the same is pending. Thus, according to her under these circumstances the cohabitation was not possible because of the fault or wrong on the part of the Petitioner-husband. The learned Advocate for the Respondent wife has submitted that in this case decree for divorce cannot be passed in favour of the petitioner-husband. In order to substantiate his proposition he has placed reliance on a case **Dharmendra Kumar V/s Usha Kumar AIR 1977 SC 2218**. We have carefully gone through the facts of the said case. That was a case where after a little over two years of passing of decree of restitution of conjugal rights in her favour, the wife applied for dissolution of marriage under Sec. 13(1A)(ii) and the husband in his written statement alleged that the wife refused to return or reply to the letters written by the husband and did not respond to his other attempts to make her agree to live with him. The Apex Court observed that this allegation, even if t true, did not amount to misconduct grave enough to disentitle the wife to the relief she asked for. While coming to such conclusion the Apex Court has specifically observed that Sec. 13(1A)(ii) of Hindu Marriage 1955 allows either party to

a marriage to present a petition for the dissolution of the marriage by a decree of divorce on the ground that there has been no restitution of conjugal rights as between the parties to the marriage for the period specified in the provision after the passing of the decree for restitution of conjugal rights. Sub Section (1A) was introduced in Sec. 13 by Section 2 of the Hindu Marriage (amendment) Act, 1964, Section 13 as it stood before the 1964 amendment permitted only the spouse who had obtained the decree for restitution of conjugal rights to apply for relief by way of divorce, the party against whom the decree was passed was not given that right. The Apex Court has further concurred with the view taken by the Full Bench of Delhi High Court in **Ram Kali's case (ILR 1971) 1 Delhi 6** wherein it was held that mere non compliance with the decree for restitution does not constitute a wrong within the meaning of Section 23(1)(a).

14. In the above cited ruling the Full Bench has observed :

> Section 23 existed in the statute book prior to the insertion of Section 13 (1A).. Had Parliament intended that a party which is guilty of a matrimonial offence and against which a decree for judicial separation or restitution of conjugal rights had been passed, was in view of Sec.

> 23 of the Act, not entitled to obtain divorce then it would have inserted an exception to Section 13(1A) and with such exception, the provision of Section 13(1A) would practically become redundant as the guilty party could never reap benefit of obtaining divorce, while the innocent party was entitled to obtain it even under the statute as it was before the amendment. Section 23 of the Act, therefore cannot be construed so as to make the effect of amendment of the law by insertion of Section 13(1A) nugatory..... The expression "petition is not in any way taking advantage of his or her own wrong" occurring in Cl.(a) of S.23(1) of the Act does not apply to taking advantage of the statement right to obtain dissolution of marriage which has been conferred on him by Sec.13(1A).. In such a case, a party is not taking advantage of his own wrong, but of the legal right following upon of the passing of the decree and the failure of the parties to comply with the decree..."

. The Apex Court has made following observations in **AIR 1977 NSC 2218 :**

> It would not be very reasonable to think

> that the relief which is available to the spouse against whom a decree for restitution has been passed, should be denied to the one who does not insist on compliance with the decree passed in his or her favour. In order to be a "wrong" within the meaning of Section 23(1)(a), the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion. It must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled.

15. If we take into consideration the facts of the present case wherein it is alleged that after passing of the decree for restitution of conjugal rights the Petitioner-husband had sent letter to the wife but the wife did not reply it cannot be necessarily be said that by this conduct the Petitioner-husband has committed any such grave wrong as contemplated under Section 23(1a) of Hindu Marriage Act. Incidently, it must be noted here that in the instant case admittedly the wife had not even moved the Court by filing execution proceedings which could have been done under the law. No doubt, even after the initiation of the execution proceedings the situation would have remained in the same viz. there would not been cohabitation but non filing of the execution proceedings by wife also creates some doubt as

to whether in fact she had genuine desire of implementing the decree or not. No sufficient evidence is also brought on record by the wife to show that after the passing of the decree she made efforts to go and cohabit with the husband but he refused. On the contrary, in all probabilities she might not have gone because according to her the husband had in fact performed second marriage. Thus, the above cited ruling is not useful to the present Respondent-wife. So, under such circumstances one thing is certain that in the instant case having regard to all the facts it cannot be said that the lower Court has committed any error in granting decree for divorce in favour of the Petitioner-husband.

16. The learned Advocate for the Respondent-wife has also drawn our attention to a case **Mrs.Sunita Rajendra Nikalje V/s Rajendra Eknath Nikalje 1996(2) Bom.C.R. 422**. In this case the husband had filed petition for restitution of conjugal rights and it was decreed in his favour. Thereafter he filed petition for divorce on the ground that there was no resumption of cohabitation for more than 1 year after he date of passing of the decree for restitution of conjugal rights. It was his case that after the decree he wrote several letters to wife calling upon her to resume cohabitation but she neither replied nor resume cohabitation. The wife took the contention that after the decree she had gone to the

house of husband for cohabitation. However, her mother in law declined to accept her and she was driven out forcibly. She even lodged a complaint for the same. She, therefore, contended in the said petition that her husband is not entitled to take advantage of his own wrong. Considering the facts on record, the Division Bench found that conduct and behaviour of the husband was such that as a result of the same it became impossible for the wife to go and cohabit, So, under such circumstances, the Division Bench of this Court observed that it cannot be said that husband was not taking advantage of his own wrong. Hence the Division bench of this Court refused to pass decree for divorce. However,in the instant case the facts are different. There is no evidence worth the name to show that after passing of the decree for restitution of conjugal rights the Respondent-wife had made any genuine effort to go and cohabit with her husband. Admittedly, she did not even file execution proceedings. Nor there is sufficient evidence to show that she had written any letter. On the contrary, admittedly, the Petitioner-husband had written a letter thereby calling upon her to come and cohabit. The Respondent-wife took vague contention that when she had gone the petitioner-husband did not allow her to come. However, there is no evidence to show the same. So, in these circumstances, we are not at all inclined to hold that the Petitioner-husband is trying to take advantage of his wrong as contemplated under Section 23(1) of Hindu Marriage Act,

1955. In fact, in the above mentioned Division Bench judgment, the court has observed that it depends upon the facts and circumstances of each case to judge whether party in question was wrong or not. So, above cited ruling is also of no use to the Respondent-wife i.e. present appellant.

17. There is another aspect of the matter. From the evidence on record it is very clear that the parties are residing separately since 1993. Even after passing of the decree of restitution of conjugal rights no cohabitation has taken place between them. So, there is no possibility of reunion between the parties. It must be held that there are misunderstandings between the parties and there is no love and affection between them. There is no possibility that they would continue as husband and wife. So, under such circumstances it is proper to grant separation than to compel them to join together. If such separation is not granted then that itself would in fact cause mental agonies to both the parties. Thus, in short, the marriage between the Petitioner and Respondent has irretrievably broken down. So, considering this aspect also it is necessary to confirm the decree of divorce. For this purpose useful reference can be made to a case of **V. Bhagat V/s Mrs.D.Bhagat AIR 1994 SC 710** wherein Their Lordships have observed :

Though irretrievable break down of the

> marriage is not a ground by itself for divorce, while scrutinising the evidence on record to determine whether the grounds alleged are made out and in determining the relief to be granted, the circumstances that the marriage has irretrievably broken down can certainly be borne in mind. This is thus an additional factor which has to be borne in mind while considering the question of granting a decree of divorce."

18. In view of the above discussion, it is very clear that there is no error of law in the order passed by the learned Judge of the Family Court NO.3, Pune. Naturally there is no necessity to interfere with the said order. Hence, the appeal is dismissed. Under the circumstances of the case parties to bear their own costs of this appeal.

(S.R.SATHE,J.) **(S.B.MHASE,J.)**